

Office of the Attorney General  
State of North Dakota

Opinion No. 85-43

Date Issued: November 25, 1985

Requested by: Dr. Wayne G. Sanstead  
Superintendent of Public Instruction

--QUESTION PRESENTED--

Whether the superintendent of public instruction has the authority to promulgate administrative rules providing the method by which parochial and private schools shall be deemed to be approved as provided in N.D.C.C. § 15-34.1-03.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that the superintendent of public instruction has the authority to promulgate administrative rules providing the method by which parochial and private schools shall be deemed to be approved as provided in N.D.C.C. § 15-34.1-03.

--ANALYSIS--

According to North Dakota's compulsory school attendance law, every parent, guardian, or other person who resides within any school district, or who resides upon any government base or installation without any school district, and has control over any educable child of an age of seven years to sixteen years shall send or take such child to a public school each year during the entire time such school is in session. N.D.C.C. § 15-34.1-01. The exception to this law is found in N.D.C.C. § 15-34.1-03 which provides that the parent, guardian, or other person having control of the child required to attend school shall be excused by the school board from causing the child to attend public school whenever it can be shown to the satisfaction of the board that the child is in attendance for the same length of time at a parochial or private school approved by the county superintendent of schools and the superintendent of public instruction. To be considered an approved school in North Dakota, the parochial or private school must have teachers certified in accordance with N.D.C.C. § 15-41-25 and Ch. 15-36. An approved school must also offer specific subjects as listed in N.D.C.C. §§ 15-38-07, 15-41-06, and 15-41-24, and must comply with all municipal and safety health, fire and safety laws, N.D.C.C. § 15-34.1-03(1).

While this statute sets out the minimum requirements for school approval, the statute does not set out a method by which the

superintendent can determine whether the school has complied with these requirements and, therefore, shall be approved. In other words, the statute provides substantive law without procedural legal guidance. The issue is whether the superintendent of public instruction has the authority to promulgate administrative rules providing the method by which parochial and private schools shall be deemed to be approved as provided in N.D.C.C. § 15-34.1-03.

As an administrative agency under N.D.C.C. Ch. 28-32, the superintendent of public instruction shall prescribe and cause to be enforced rules and regulations as may be necessary to enforce the school laws of the State of North Dakota. N.D.C.C. §§ 15-21-07, 28-32-02. More specifically, the superintendent of public instruction, after consulting with the teachers' professional practices commission, shall determine the criteria for teacher certification. The established criteria shall be based upon standards which shall include considerations of character, adequate educational preparation, and general fitness to teach. After holding a public hearing, the superintendent shall issue rules and regulations concerning the issuance of teachers' certificates and such certificates shall be issued by his office in accordance with such rules and regulations. N.D.C.C. § 15-36-01.

As provided in N.D.C.C. § 28-32-02, rules which are promulgated by the superintendent of public instruction must be reasonable and must conform with the provisions of statutes administered or enforced by the department of public instruction. These statutes may also prescribe methods and procedures regarding the enforcement of these statutes. However, it is clear that an administrative rule may not exceed statutory authority or supersede a statute. *Steele v. North Dakota Workmen's Compensation Bureau*, 273 N.W.2d 692 (N.D. 1978). Therefore, while the superintendent of public instruction does not have the authority to change or alter the minimum requirements for parochial or private school approval as set forth in N.D.C.C. § 15-34.1-03(1), he may promulgate rules as to the method by which parochial and private schools shall be deemed to be approved as provided by the statute.

The question of the proper procedure for obtaining school approval has surfaced lately in connection with nonpublic religious schools whose officials object for various religious reasons to the approval procedure utilized by the department of public instruction. The question has been presented as to whether the superintendent of public instruction has the authority to provide alternative procedures in determining whether a school satisfies the statutory requirements for approval. Such alternative procedures could be available to those who are unable to use the standard approval procedure for whatever reasons.

As this opinion has previously indicated, the superintendent of public instruction does possess the statutory authority to enact administrative rules providing those procedures which must be followed in order for the superintendent to approve a school. In promulgating such administrative rules, the superintendent may indeed provide alternative procedures for those who may not make use of the standard procedures. However, the point to be emphasized is that the superintendent's authority to enact administrative rules concerns solely the procedure whereby a school may be deemed to be approved. Such rules may not alter the specific statutory requirements for school approval as established by the North Dakota Legislature.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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